SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 117.

THE DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

v.

ALICE BROOKE, DEFENDANT IN ERROR.

BRIEF FOR THE APPELLANT.

STATEMENT OF THE CASE.

This case comes up on a writ of error from the Court of Appeals of the District of Columbia, affirming a judgment of the Supreme Court of that District, which held to be unconstitutional the fourth section of the act of Congress of May 19, 1896, providing for the drainage of lots in the District of Columbia.

A petition was filed in the Supreme Court of that District for a writ of certiorari requesting the cancellation of certain assessments made against the property of the petitioner, defendant here, for work done thereon by the District of Columbia under the authority of the act referred to, commonly known as "the drainage act."

The petition recites that the defendant in error is a resident of Maryland and the owner of a row of five houses in

the southeast section of the city; that the Commissioners of the District undertook to connect the said premises with water main and sewer, under the authority of the said act, which act is unconstitutional and void because of discrimination between owners of real estate in the District; and that the assessments laid upon the said property because of the said work is invalid because of certain irregularities specified (Record, p. 3).

A rule to show cause why the writ of certiorari should not issue was obtained. A return to the rule was made, consisting of two parts—Part I, a formal answer under oath to the petition, and, Part II, copies of the official papers and records in the custody of the appellant pertaining to the said work and assessment. After argument, the writ was ordered to issue. Thereupon the appellant adopted in full as its return to the writ the return already filed to the rule to show cause, and argument was again had, judgment rendered quashing the assessment, and appeal in open court.

The Supreme Court of the District of Columbia decided three questions: 1st, that the formal answer of the Commissioners could not be considered a part of the return; 2d, that there was no notice to the appellee, as required by the act; 3d, that the act was unconstitutional because of the discrimination between property-owners.

Part I of the return shows that the defendant in error *could not be found in the District* after diligent search, and that she was at the time of the performance of the acts complained of a resident of Silver Hill, Maryland; that she was given the notice, as required by the act, which was sent her by registered mail to Silver Hill, Maryland, postage prepaid, and the registry return card with her signature thereon is exhibited; that thereafter the plaintiff caused plans and specifications to be prepared for the execution of the work of connecting the said premises with the sewer and water main, proposals for the said work were called for by advertisement, and the work let to the lowest bidder, and was duly per-

formed. The irregularities alleged in the petition are denied (Record, pp. 6-7).

Part II of the return (Record, pp. 8 to 13, inc.) contains the registry return receipt, a copy of the advertisement with the certificate of the secretary to the Commissioners that the notice was so advertised, order of the Commissioners to have the work performed, request of the Inspector of Plumbing that bids be advertised for, a copy of such advertisement, the bids received, the acceptance of the lowest bid, and a copy of the assessment of the cost of the work ($470.77) against the property.

For the convenience of the court, the act, which is a brief one, is reproduced *in extenso*, ~~in the Appendix~~.

> "AN ACT to Provide for the Drainage of Lots in the District of Columbia.
>
> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That each original lot or subdivisional lot situated on any street in the District of Columbia where there is a public sewer shall be connected with said sewer in such manner that any and all of the drainage of such lot, whether water or liquid refuse of any kind, except human urine and fecal matter, shall flow into said sewer; and if such original lot or subdivisional lot is situated on any street in said District where there is a public sewer and water main, such original lot or subdivisional lot shall be connected with said sewer and also with said water main in such manner that any and all of the drainage of such lot, whether water or liquid refuse of any kind shall flow into said sewer: *Provided*, That the connections required to be made by this act shall be made under the following conditions: When there is on any such original lot or subdivisional lot aforesaid any building used or intended to be used as a dwelling, or in which persons are employed or intended to be employed in any manufacture, trade, or business, or any stable, shed, pen, or

place where cows, horses, mules, or other animals are kept, then, and in that instance, such original lot or subdivisional lot shall be connected with a public sewer and water main or with a public sewer, as may be required with this act; and whenever, there is no such building, stable, shed, pen, or place, as aforesaid, on such original lot or subdivisional lot, then such lot shall be required to be connected with a public sewer only when it has been certified by the health officer of said District that such connection is necessary to public health.

"SEC. 2. That it shall be the duty of the Commissioners of said District to notify the owner or owners of every lot required by this act to be connected with a public sewer or water main, as the case may be, to so connect such lot, the work to be done in accordance with the regulations governing plumbing and house drainage in said District.

"SEC. 3. That if the owner or owners of any such lot neglect or refuse to make such connections as are required by this act within thirty days after the receipt of such notice, such owner or owners shall be deemed guilty of a misdemeanor, and shall, on conviction in the Police Court of said District, be punished by a fine of not less than one dollar nor more than five dollars for each day he, she, or they fail or neglect to make such connections.

"SEC. 4. That in case the owner or owners of any such lot be a non-resident or non-residents of the District of Columbia, or cannot be found therein, then, and in that case, the said Commissioners shall give notice, by publication twice a week for two weeks in some daily newspaper published in the city of Washington, to such owner, directing the connection of such lot with such public sewer or with such public sewer and water main, as the case may be: *Provided, however,* That if the residence or place of abode of the said non-resident lot owner be known or can be ascertained on reasonable inquiry, then, and in that case, a copy of the aforesaid notice shall be mailed to said non-resident, addressed to him in his proper name at his said place of

residence or abode, with legal postage prepaid; and in case such owner or owners shall fail or neglect to comply with the notice aforesaid within thirty days it shall be the duty of said Commissioners to cause such connection to be made, the expense to be paid out of the emergency fund; such expense, with necessary expense of advertisement, shall be assessed as a tax against such lot, which tax shall be carried on the regular tax roll of the District of Columbia, and shall be collected in the manner provided for the collection of other taxes.

"Approved, May 19, 1896" (29 Statutes, 125).

The Court of Appeals, in sustaining the judgment of the Supreme Court of the District, held that the return was a proper one, that the defendant had notice of the work about to be done, but that the act was unconstitutional.

Assignment of Errors.

1. The court below erred in giving judgment for the defendant in error, and in ordering the assessment against the property of the defendant in error to be quashed.

2. The court below erred in holding the said assessment to be illegal and void.

3. The court below erred in ordering the said assessment to be quashed.

4. The court below erred in holding section 4 of the said act to be unconstitutional and void.

ARGUMENT.

I.

The discrimination in this law is not between the resident and non-resident, but between those who can be found in the District and those who cannot be found in the District.

> "The legislation in question in the present case is that of the Congress of the United States, and must be considered in the light of the conclusion, so often announced by this court, that the United States possess complete jurisdiction, both of a political and municipal nature, over the District of Columbia."
>
> Parsons *v.* District of Columbia, 170 U. S., 53.

> "There is in this District no division of powers between the General and State governments. Congress has the entire control over the District for every purpose of government."
>
> Kendall *v.* The United States, 12 Peters, 619.

> "Congress may legislate within the District, respecting the people and property therein, as may the legislature of any State over any of its subordinate municipalities."
>
> Mattingly *v.* District of Columbia, 97 U. S., 687.

The Court of Appeals held that the authority of Congress to enact the statute in question was referable to the police power. The opinion says (Record, p. 23):

> "The sole object of this act is to provide for connecting certain improved premises in the District with public sewers and mater mains. Legislation to effect such an object is a proper and legitimate exercise of police power."

If the provision in section 4 of the statute for assessment "as a tax against such lot" in case the owner or owners of any such lot be a non-resident or non-residents of the District of Columbia, or cannot be found therein, be referable to the taxing power, then Congress had the right, by virtue of its control over this District under the Constitution, to exempt the property of residents from the tax.

> "In the exercise of this power, Congress like any State legislature unrestricted by constitutional provisions, may at its discretion, wholly exempt certain classes of property from taxation, or may tax them at a lower rate than other property."
>
> Gibbons *v.* District of Columbia, 116 U. S., 427.

The Court of Appeals construed said section 4 as imposing an unequal discrimination, without the element of uniformity requisite under the police power; that inequality was found by the court apparently in one part of the opinion to consist in a discrimination between residents and non-residents or persons who cannot be found in the District. The opinion says:

> "Thus, it will be seen that, the real object of the law is certain to be effectuated only in the case of non-residents or persons who cannot be found in the District. As to the much larger number of resident owners, the law does not authorize any action by the Commissioners, but merely provides that if such owners decline to comply with the act they shall be fined" (Record, bottom of page 24, and top of page 25).

The discrimination made in the statute is not between residents and non-residents. Section 4 of the statute, by its express terms, in the opening sentence distinguishes only between resident owners who can be found and resident or non-resident owners who cannot be found.

The test of the application of section 4 is whether the property owner can be found in the District, and that is the question presented in the record. Indeed, the opinion practically states this. It says:

> "If he lives in the District or can be found here, his *premises* may not be molested but he may be fined. If he cannot be found here the object of the law is easily effectuated and the expenses connected therewith become a charge upon the lot" (Record, p. 25).

The return of the plaintiff in error to the rule and writ of certiorari states:

> "Respondent says that diligent search was made by the officers and agents of respondent to find the said petitioner within the District of Columbia, but she could not be found there, after such diligent search. That the petitioner was informed and believed and still believes that the said petitioner was at the time of the performance of the acts complained of, and is now a citizen of the State of Maryland, and resides and did reside at Silver Hill, Maryland."

It thus appears, by the record, that the respondent could not be found in the District. If a resident owner "cannot be found therein" and the Commissioners comply with the conditions of said section 4, they may do the necessary work and assess and collect the tax precisely in the same manner as they proceed in the case of a non-resident owner.

On construing the act as an entirety, it will be observed that in substance section 1 provides that each improved lot situated on any street in the District of Columbia where there is a public sewer must be connected with it, and if there is also a water main such lot must be connected with that; and every unimproved lot must be so connected when necessary to public health. This is a duty imposed on every lot-owner.

By section 2 of the act, it is the duty of the Commissioners of said District to notify the owner or owners of every lot to so connect such lot.

By section 3 of the act, if the owner or owners of any such lot neglect or refuse to make such connection as required by the act within thirty days after the receipt of such notice, such owner or owners shall be deemed guilty of a misdemeanor and shall, on conviction, be fined.

The duty of the non-resident owner, the duty of the Commissioners with respect to such non-resident owner, and the liability of the non-resident owner to punishment is exactly the duty of the resident owner, of the Commissioners in respect to such resident owner, and the liability of such resident owner to punishment.

The penalty is sufficient to coerce any resident or non-resident owner found in the District to make the necessary connection of the lot with the public sewer or water main, because for every day of failure or neglect such owner, by the intent and language of said section 3, must be punished.

It is true, as the Court of Appeals says in its opinion (Record, p. 25):

> "The assessment and collection of a fine, whether the same be large or small, is not the object of this law. Its sole object is to promote the public health."

But if the inference is to be drawn from the opinion that the resident owner only may be fined or sent to jail in default of its payment, such inference is incorrect and is contradicted by the following statement in the opinion:

> "If he lives in the District or can be found here, his *premises* may not be molested, but *he* may be fined. If he cannot be found here, the object of the law is easily effectuated, and the expenses connected therewith become a charge upon the lot."

The circumstances that the resident (or non-resident) owner may be confined in jail or be financially unable to comply with the law or may have a defective title may show possible hardships in enforcing the law, but they do not

show, it is respectfully submitted, any legal reason for holding that there is an unlawful discrimination in it.

> "The fact that the mode prescribed for the non-resident may be more inconvenient than that prescribed for the resident is not because the statute intends to make a discrimination, but because of the situation of the parties, and because, in the judgment of the law-making power, no other as effective way could be adopted for the protection of the public."
>
> McFadden *v.* Blocker, 58 L. R. A., 898.

If any distinction has been made by the Court of Appeals between residents and non-residents, such distinction does not exist under this statute because it treats absent residents and non-residents alike. There is no discrimination against the non-resident owner solely because he is a non-resident.

Even where personal liberty was involved a similar statute was held constitutional.

> Frost *v.* Brisbin, 19 Wend., 11. (This case has been cited and followed by the Court of Appeals in Howard *v.* The Citizens' Bank and Trust Co., 12 App. D. C., 222, 235, and Robinson *v.* Morrison, 2 App. D. C., 105, 128.)

Indeed, said section 4 is but an example of a class of legislation which has given for a long period in this District right of seizure of or liens on the property of non-resident owners or persons who cannot be found therein.

By act of Maryland of 1773, chapter 7, section 3, it was enacted that in any suit in chancery if any defendant against whom any process shall issue does not appear an affidavit could be made showing "to the satisfaction of the court that such defendant or defendants is or are out of this province, or that upon inquiry at his, her, or their usual place of abode, he, she, or they *could not be found* so as to be served with process," etc., process or publication could be had, and after

certain formalities the bill could be taken *pro confesso* and the decree enforced by sequestration of the real and personal estate and effects of the party or parties.

Abert's Compiled Statutes, 76, sec. 9.
1 Dorsey, Laws of Md., pp. 123, 124.

The act of Maryland of 1785, chapter 72, section 30, provided a remedy by actual service or by publication against any mortgagor or person claiming under him residing out of the State (Abert's Compiled Statutes, 491; 1 Dorsey's Laws Md., 225).

The Maryland act of 1787, chapter 30, section 2, provided "if in any suit in chancery against any defendant or defendants who resides out of this State to compel a conveyance of land, or real or personal property, in this State, on affidavit being made to the satisfaction of the court, that such defendant or defendants *is or are out of the State*, and that personal notice has been served on the defendant or defendants, or that notice of filing such bill hath been given ten weeks in the public newspapers," etc., a decree *pro confesso* may be taken and a decree may be made thereon which on certain conditions will stand confirmed.

Abert's Compiled Statutes, p. 93.

Section 768 of the Revised Statutes of the United States, relating to the District of Columbia, provided:

> "The Supreme Court has power to proceed in all common law and chancery causes instituted before it, in which either of the parties reside without the District, in the same way that non-residents were proceeded against in the general court or in the Supreme Court of Chancery in the State of Maryland on the third day of May, eighteen hundred and two."

Sections 787 and 788 of the Revised Statutes of the District of Columbia provided:

> "Publication may be substituted for personal service of process upon any defendant who cannot be

found, in suits for partition, divorce, by attachment, for the foreclosure of mortgages and deeds of trust, and for the enforcement of mechanics' liens and all other liens against real or personal property, and in all actions at law or in equity which have for their immediate object the enforcement or establishment of any lawful right, claim or demand to or against any real or personal property within the jurisdiction of the court." (Referred to in Simmons *v.* Fry, 19 D. C., 472; Plumb *v.* Bateman, 2 App. D. C., 156.)

"SEC. 788. No order for the substitution of publication for personal service shall be made till a summons for the defendant shall have been issued and returned 'not to be found.'"

Sections 105 and 106 of the Code of the District of Columbia provide:

"SEC. 105. Publication may be substituted for personal service of process upon any defendant who cannot be found and who is shown by affidavit to be a non-resident, or to have been absent from the District for at least six months, or against the unknown heirs or devisees of deceased persons, in suits for partition, divorce, by attachment, foreclosure of mortgages and deeds of trust, the establishment of title to real estate by possession, the enforcement of mechanics' liens, and all other liens against real or personal property within the District, and in all actions at law and in equity which have for their immediate object the enforcement or establishment of any lawful right, claim or demand, to or against any real or personal property within the jurisdiction of the court.

"SEC. 106. No order for the substitution of publication for personal service shall be made until a summons for the defendant shall have been issued and returned 'not to be found,' and the non-residence of the defendant or his absence for at least six months shall be proved by affidavit to the satisfaction of the court." (Construed in Jones *v.* Rutherford, 26 App. D. C., 114, 118.)

In principle, it is submitted, the discrimination, if there is any discrimination, between non-residents or persons who cannot be found and residents is the same in the Maryland Statutes, the Revised Statutes, and the Code as the so-called discrimination in section 4 of the act approved May 19, 1896 (29 Statutes, 125), now under consideration.

No court has doubted the constitutionality of above statutes here compared with the last-named act.

II.

If it be thought that the discrimination is between residents and non-residents, nevertheless the discrimination is a reasonable one.

It is a matter of common knowledge in the legal profession that statutes exist in nearly every State of this country permitting an attachment against the property of non-residents, real and personal, in actions *ex contractu*, before any adjudication of the debt is had, where none is permitted against the resident.

Also, laws discriminating against non-residents in other matters are not uncommon and the courts are constantly enforcing them.

Assuming that a clear distinction is made in the statute in favor of residents and against non-residents, and that the statute is subject to every criticism made in the opinion of the Court of Appeals, we respectfully maintain that the discrimination in the act is neither unreasonable nor unjust.

The only authority cited by the Court of Appeals in its opinion (Record, p. 24) is Mc e *v.* District of Columbia, 24 App. D. C., 22. The statute construed in that case did not refer on its face to any distinction between residents and non-residents. It does not appear that McGuire, the appellant, was in fact a non-resident, or what relation he bore to the property, or whether he was in a situation to complain

of the inequalities of the law then under consideration; and no authority is cited in favor of the position of the court in that opinion. It is respectfully submitted that the McGuire case is not authority for the position taken by the Court of Appeals in this case.

It was insisted in Central Loan and Trust Co. *v.* Campbell Commission Co. that a territorial statute authorizing the issue of an attachment against the property of a non-resident defendant without condition precedent that a bond be filed, while in like proceedings against a resident no bond was required, was in conflict with the Fourteenth Amendment to the Constitution of the United States because in such case non-residents are not capable of separate identification from residents by any fact or circumstance other than they are non-residents. This court sustained the law. In the opinion it was said:

> "But the difference between exacting a bond in the one case, and not in the other, is nothing like as great as that which arises from allowing process of attachment against a non-resident and not permitting such process against a resident in any case. That the distinction between a resident and a non-resident is so broad as to authorize a classification, in accordance with the suggestion just made, is conceded, and, if it were not, is obvious."
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> Central Loan & Trust Co. *v.* Campbell Commission Co., 173 U. S., 84.

On the same ground the Supreme Court of Ohio held that no unconstitutional discrimination between resident owners of land along the line of a ditch is made by a statute permitting any resident owner, when the ditch needs cleaning, to petition therefor under a section simply requiring a sworn statement of such necessity to be made to the county auditor, while non-resident owners can only petition for such improvement under a section which requires application to be

made to the county commissioners, and the giving of a bond for the payment of costs, if the application is not granted.

Taylor *v.* Crawford, 72 Ohio St., 560.

A statute imposing heavier penalties upon non-residents for violation of game laws does not deny them the equal protection of the laws. Allen *v.* Wyckoff, 48 N. J. L., 90.

After the cession of Maryland, but before the first Monday in December, 1800, the time when the seat of government was to be removed to the District of Columbia, land in this District belonging to Robert Morris was attached, and it was held:

> "A law subjecting the property of a citizen of another State, situate in this State, to attachment here by a process different from that used in the attachment of the property of a citizen of this State, is not in contravention of the clause of the Constitution of the United States declaring that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States."
>
> Campbell *v.* Morris, 3 H. & McH., 535.

Chemung Canal Bank *v.* Lowery, 93 U. S., 72:

> "A statute of Wisconsin providing that the statute of limitations shall not run against a defendant who is out of the State if he resides within the State, but shall, if he resides out of the State, is not repugnant to article IV (equal privileges and immunities).

Field *v.* Barber Asphalt Co., 194 U. S., 618, 621-622:

> "The exact point of objection is that the improvement is not to be made if a majority of the resident owners of the property liable to taxation therefor shall file with the city clerk a protest against such improvement, which privilege of protest is not given to non-resident owners, thereby discriminating against them. It is well settled, however, that not every discrimination of this character violates con-

stitutional rights. It is not the purpose of the Fourteenth Amendment, as has been frequently held, to prevent the States from classifying the subject of legislation, and making different regulations as to the property of different individuals differently situated. The provision of the Federal Constitution is satisfied if all persons similarly situated are treated alike in privileges conferred or liabilities imposed. (Citing cases.) The alleged discrimination is certainly not an arbitrary one; the presence within the city of the resident property owners, their direct interest in the subject-matter, and their ability to protest promptly if the means employed are objectionable, place them on a distinct footing from the non-resident, whom it may be difficult to reach."

In Savannah, etc., Ry. *v.* Savannah, 198 U. S., 392, the court held valid an ordinance of the city of Savannah taxing street railroads within the city, while not taxing a steam railroad which had branch tracks in the city and charged extra for local deliveries of freight, most of the business of the steam road being done out of the city.

Hawley *v.* Hurd, 72 Vt., 122:

> "A statute which exempts from attachment negotiable paper held by a bank within the State does not work a discrimination against banks without the State, under article IV, section 2, Federal Constitution."

McFadden *v.* Blocker, 54 S. W., 872:

> "A statute of Arkansas, by Congress extended to Indian Territory, which provides that mortgages of chattel mortgages executed by non-residents shall take possession in order to secure a lien against third parties, while those executed by residents need only be recorded where the mortgagor resides, does not infringe article IV, section 2."

Tatem *v.* Wright, 23 N. J. L., 429:

"Tax upon agents of non-resident corporations held to be valid. No such tax on agents of resident corporations."

Id., Ins. Co. *v.* Com., 5 Bush., 68 (79).
Id., Ins. Co. *v.* N. O., 1 Woods, 85.

Conn. *v.* Ins. Co., 73 Conn., 255:

"Different method of taxing resident and non-resident stockholders whereby the latter were compelled to pay a higher rate. Held constitutional."

Cribbs *v.* Benedict, 64 Ark., 555:

"Assessments for digging ditches to be collected against a resident by proceedings in the Circuit Court, and against a non-resident by a tax on the land—not an infringement of article IV, section 2, U. S. Constitution" (563)

"Residents of Territories and Reservations.—These prohibitions do not prevent Congress from giving residents of unorganized Territories and Indian reservations privileges and immunities not accorded non-residents therein."

8 Cyc., 1038.

"This does not, however, prevent a State from taxing all companies doing a certain kind of business; from placing on foreign corporations a different tax from that placed on similar domestic corporations; from placing a different tax on corporate stock owned by a non-resident than the tax on such stock owned by a resident."

8 Cyc., 1047.

"The State may provide a special method of valuation of lands belonging to non-residents; * * * so, too, it may provide the manner of charging the assessment and for notice to residents only in assessing omitted property."

8 Cyc., 1048.

8 Cyc., 1073:

> "The Fourteenth Amendment was intended to secure equality of rights to all people; and this includes equal exemption with others of the same class from all charges and burdens of every kind, although a law *may discriminate* in favor of a certain class, and if *founded upon a reasonable* distinction in principle, it does not deny the equal protection of the laws."

The equal protection of the laws "is not impaired by a State statute requiring every non-resident owner to file, under penalty of a fine for non-compliance, a list more particularly descriptive of his realty than is required of the resident tax-payer" (1 Cooley, 3d ed., p. 80; Commonwealth *v.* Holiday, 98 Ky., 616).

Allen *v.* Wyckoff, 18 N. J. L., 90:

> "An act imposing greater restrictions and severer penalties for the protection of fish and game upon non-residents than upon residents does not violate the Fourteenth Amendment of the Federal Constitution."

III.

There is no unlawful discrimination in the remedy which may be used to enforce the doing of the work prescribed by the act. All owners may be required to do such work.

(*a.*)

The reasoning of the Court of Appeals (Record, p. 25) is that the act is unconstitutional because the remedy, by fine, against the resident, is not adequate, following the argument of the court in the McGuire case (24 App. D. C., pp. 30-31). It is difficult to perceive how the effectiveness or inadequacy of a remedy affects the validity. A remedy by fine, or by

imprisonment in default of payment of the fine, may fall far short of achieving the purpose of a law, but this is a matter for legislative discretion, and is the manner in which the laws are usually enforced. It does not affect in the least the legality of the enactment. But the remedy against the non-resident, or person who cannot be found, is admittedly effective, and the case at bar is such a case. There is no question here concerning a resident or person who can be found in the District. The matter of constitutionality as to residents who can be found, would seem, therefore, not to be involved. At least the Court of Appeals decided in D. C. *v.* Green, 29 App. D. C., 295, where a resident was prosecuted for the violation of the Act of March 1, 1899, relating to weeds, a very similar piece of legislation, that the constitutional question of unjust discrimination was not before the court.

Schmidt *v.* City of Indianapolis, 168 Ind., 631.

The provision that the Commissioners may charge the cost of connecting the sewer and water main against the property of non-residents or persons who cannot be found in this District is simply a remedy and not a discrimination.

All property must be so connected by whomsoever owned under the terms of section 1 of the act approved May 19, 1896; all owners must be notified to do so under the provisions of section 2, and by section 3 all owners are deemed guilty of a misdemeanor on neglect or refusal to comply with such notice. Resident owners who can be found in the District may be required to comply with the statute by an effective remedy, hence the difference is merely in the kind of remedy.

The statement of the discrimination made in the opinion of the Court of Appeals (Record, p. 25) "As to the much larger number of resident owners, the law does not authorize any action by the Commissioners, but merely provides that if such owners decline to comply with the act, they shall be fined," we respectfully submit, is erroneous.

That the non-resident owner who cannot be found cannot be fined is of no importance.

The statute is effective and may be enforced against all persons by civil process, notwithstanding its penal provisions.

The fact that keeping a nuisance is a crime does not deprive a court of equity of the power to abate the nuisance.

Carllton *v.* Rugg (Mass.), 5 L. R. A., 193.

> "There are many cases," * * * "where the remedy by injunction would be much more efficacious than by enforcing the penalties of an ordinance; and where the nuisance is one affecting only or principally the inhabitants of the municipality, and its abatement is among the powers granted or duties imposed upon it, there would seem to be no good reason why the action to abate might not be brought in the name of the municipality, as well as in the name of the State itself by the Attorney-General."
>
> Village of Pine City *v.* Munch (Minn.), 6 L. R. A., 763.

The duty to make said connections having been imposed on all owners and the duty of requiring all owners to do the work having been cast on the Commissioners by the statute, why cannot the obligations of the statute be enforced by mandatory injunction?

A bill in equity is maintainable by the Commissioners of this District in their own names as Commissioners for a mandatory injunction to compel a person, whose license to temporarily occupy a portion of a public avenue and parking has been revoked, to remove a structure used as a refreshment stand from such avenue and parking.

McBride *v.* Ross, 13 App. D. C., 576.

To remove a show-window.

Guerin *v.* Macfarland, 27 App. D. C., 478.

"As there is, in such cases, a judicial remedy in favor of the citizen, so on principle the right of the corporate authorities to resort at their election to the courts in proper cases to aid them when the citizen is in the wrong, should, in the author's judgment, be also recognized."

1 Dillon Mun. Corp. (3rd ed.), sec. 379, page 384.

Watertown *v.* Cowan, 4 Paige Ch., 510.

Village of Pine City *v.* Munch (Minn.), 6 L. R. A., 763.

(b.)

Even in the exercise of the taxing power, which the courts construe more strictly, a wide latitude is observed, and upheld by the courts.

Pacific Express Co. *v.* Seibert, 142 U. S., 339; p. 351:

"This court has repeatedly laid down the doctrine that diversity of taxation, both with respect to the amount imposed and the various species of property selected either for bearing its burdens or for being exempt from them, is not inconsistent with a perfect uniformity and equality of taxation in the proper sense of those terms; and that a system which imposes the same tax upon every species of property, irrespective of its condition or class, will be destructive of the principle of uniformity and equality in taxation and of the just adaptation of property to its burden."

Charleston, etc., R. R. *v.* Gibbs, 142 U. S., 386:

"The property of railroads in South Carolina is subjected by the general law to the same tax as similar property of individuals, in proportion to its value, and like conditions of uniformity and equality in its assessment are imposed. A further tax laid upon them to meet the expenses and salaries of the railroad commissioners is not in proportion to the

> value of the property, but according to the gross income proportioned to the number of miles of their roads in the State."

It was objected that the tax to pay for the services of the railroad commissioners was illegal and not uniform.

> "The railroad commissioners are charged with a variety of duties in connection with the railroad, the performance of which is of great importance in the regulation of those instruments of transportation."

Held, that the tax was valid.

Columbia Southern R. R. *v.* Wright, 151 U. S., 470 (478):

> "The transitory or unlocated personal property of the railroad was distributed among the counties of the State for taxation and taxed by the counties at different rates. It was objected that this method was unjust discrimination, but the court held that it was not."

Merchants' Bank *v.* Pennsylvania, 167 U. S., 461:

> "A statute permitting banks to pay eight mills on the dollar of its capital stock at par if it is paid before the first of March; and if not, to pay four mills on the actual value, does not infringe the Constitution of the United States."

BREWER, *J.* (p. 463):

> "If a bank has a large surplus, and its stock in consequence, worth five or six times its par value, naturally it elects to collect and pay the eight mills, and thus in fact it pays at a less rate on the actual value of its property than the bank without a surplus, and whose stock is only at par. So it is possible, under the operation of this law, that one bank may pay at a less rate upon the actual value of its banking property than another; but the banks which do not make this election, whether state or national, pay more than the regular tax. The result of the election under the circumstances is simply that those electing pay less.

But this lack of uniformity in the result furnishes no ground of complaint under the Federal Constitution. * * *

"Again, it will be perceived this inequality in the burden results from a privilege *offered to all*, and in order to induce prompt payment of taxes and payment without litigation."

Magoun *v.* Bank, 170 U. S., 283:

"Sustaining an inheritance tax law of Illinois which taxed strangers to the estate more than relatives, and relatives unequally."

In L'Hote *v.* New Orleans, 177 U. S., 587, an ordinance of New Orleans, prohibiting any lewd or abandoned woman from occupying, inhabiting, living, or sleeping in any room, outside of certain defined limits, was upheld as a valid exercise of the police power.

In Petit *v.* Minnesota, 177 U. S., 164, a statute of Minnesota was upheld which forbade labor on Sunday except works of necessity and charity, and declared that hair cutting and shaving on Sundays were not such, as applied to barber shops kept open for that purpose.

American Sugar Refining Co. *v.* Louisiana, 179 U. S., 89:

"*Syllabus.*—A State imposing a license tax upon persons and corporations carrying on the business of refining sugar and molasses does not, by exempting from such tax 'planters and farmers grinding and refining their own sugar and molasses,' deny sugar refiners the equal protection of the laws within the Fourteenth Amendment."

In Austin *v.* Tennessee, 179 U. S., 343, the Supreme Court declared that it would not take judicial notice of the fact that tobacco was more noxious in the form of cigarettes than in any other; but the court held valid a statute of the State of Tennessee prohibiting "any person, firm, or corpo-

ration to sell, offer to sell, or bring into the State for the purpose of selling, giving away, or otherwise disposing of any cigarettes, cigarette paper, or substitute for the same."

In St. John *v.* New York, 201 U. S., 633, the court held valid, as an exercise of the police power, a statute of the State of New York prohibiting the sale of adulterated milk, in which non-producers of milk selling that article were held to an absolute standard and punished for selling milk below the standard fixed; but producers of milk, or those selling milk from their own herds, were not held if the milk was of the same quality as it came from the herd.

Taggart *v.* Claypole, 32 L. R. A., 586:

> "Giving to residents of a territory taken in by a municipality, in annexation proceedings, the right to appeal, does not deny to non-residents equal privileges and immunities."

McFadden *v.* Blocker, 58 L. R. A., 894:

> "Non-residents of unorganized territories are not given the same rights as residents by the provisions of the Federal Constitution, providing that the citizens of each shall be entitled to all privileges and immunities," &c.

IV.

The owner cannot remain silent while work is being done, of which he has notice, and then, after it is completed and his property benefited, be heard to complain that the proceedings are illegal.

> "It is a general rule, now fully accepted in this State, that where the owner of property subject to assessment for public improvements, stands by and makes no objection to such improvements, which benefit his property, he may not deny the authority by which the improvements are made, or defeat the

assessments made against his property for the benefits derived; and that this is true both where the proceedings for the improvement are attacked for irregularity, and where their validity is denied, but color of law exists for the proceedings."

Com'rs *v.* Plotner, 149 Ind., 116, 119, cited in 2 Cooley (3d ed.), p. 1515, with many other cases from Indiana, Iowa, Kentucky, Massachusetts, Michigan, Missouri, Nebraska, New Jersey, New York, Oregon, and Pennsylvania. Approved in Wight *v.* Davidson, 181 U. S., 371-377.

Kellogg *v.* State, 15 Ohio St., 64:

"Where county commissioners acting ostensibly under the provisions of the act of March 24, 1899, 'to provide for locating, establishing and constructing ditches, drains and water courses,' have established and constructed a ditch and to pay for the same have levied an assessment on the lands of persons benefited thereby: *Held*, that where a party on whose lands such ditch has been wholly or in part constructed, has stood by and failed to resort to any remedy legal or equitable until after the ditch was made, a court of equity will not interfere by injunction to prevent the collection of such assessment, even if it be assumed that the proceedings of the commissioners have so far failed to conform to the provisions of said statute as to render them wholly illegal and void in law" (Syl.).

Vickery *v.* Board, 134 Ind., 554:

"Proceedings attacked on the ground that the law under which they were had was unconstitutional. The court held, that one who receives a benefit under an unconstitutional law cannot deny the constitutionality of such law."

McCoy *v.* Able, 131 Ind., 417:

"Principle and authority forbid that property-owners should be allowed to stand by inactive and passive until after the work has been done and then

> come in and attack either the contractor or the value of the work and materials without compensation."

Ross *v.* Stockhouse, 114 Ind., 200:

> "One who acquiesces with knowledge cannot escape payment for the actual benefits received, even though the proceedings turned out to be void; he cannot enjoy the benefits and escape the burden unless he interfere or give notice before the benefit is received."

Where an owner has knowledge of work being done by a municipality, he is put on inquiry as to the right of the corporation, and if he remain silent and fail to assert his remedy until after the improvement has been made and paid for by the municipality, he cannot resist the tax assessment on the ground of illegality of the proceedings, even where he did not know of such illegality.

State *v.* Mayor, 36 N. J. L., 162.
State *v.* Mayor, 40 N. J. L., 246.

Respectfully submitted,

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